

MASTROIANNI CONFIRMATION

Ms. WARREN. Mr. President, earlier today, the Senate confirmed Mark Mastroianni to fill a judicial vacancy in Western Massachusetts on the District Court for the District of Massachusetts.

Mr. Mastroianni came highly recommended by the Advisory Committee on Massachusetts Judicial Nominations. The advisory committee is comprised of distinguished members of the Massachusetts legal community, including prominent academics and litigators, and is chaired by former Massachusetts district court judge Nancy Gertner. Their recommendation reflects the strong sense of the Massachusetts legal community—and in particular the legal community of Western Massachusetts—that he will make an excellent district court judge.

Mr. Mastroianni is a true son of Western Massachusetts—born in Springfield and a lifelong resident of Hampden County. Prior to his confirmation, he served as the elected district attorney for Hampden County—a position he has held since 2011. He graduated with honors from the American International College in Springfield, MA and went on to earn his law degree from Western New England College School of Law—also in Springfield, MA.

Mr. Mastroianni began his career in the Hampden County district attorney's office. He served there as an assistant district attorney for over 5 years, gaining prosecutorial experience in a wide variety of district and superior court matters. He then moved into private practice, where he built a significant career as a defense attorney representing clients in criminal and civil matters. Over the course of 16 years, he represented clients in matters before the Massachusetts State trial courts and appeals courts, as well as the district court to which he has been nominated.

In November 2010, Mastroianni ran as an independent and was successfully elected to serve as the district attorney for Hampden County in the western part of Massachusetts—a position that returned him to lead the office where he began his career. As district attorney, he was responsible for managing the prosecution of all cases in the 23 cities and towns that make up Hampden County.

Aside from the impressive qualifications of this candidate, the fact of Mark's nomination is particularly important because the seat he has been nominated to fill has been vacant for far too long—since U.S. District Court Judge Ponsor took senior status in 2011. The vacancy has strained the Federal judicial system in Western Massachusetts, causing cases to be postponed, forcing judges from Boston to travel to Springfield to hold hearings, and impeding the ability of citizens to get their day in court. Filling this vacancy as quickly as possible has been a top priority for me since I arrived in

the Senate last year, and his confirmation will significantly improve the administration of justice in Western Massachusetts.

I am proud to have recommended Mark Mastroianni to President Obama. He is an independent-minded district attorney whose diverse litigation experiences, both as a top prosecutor and as a top defense attorney, will enrich the Federal bench in Massachusetts. I have no doubt that he will have a long and distinguished career as a member of the judiciary.

• Mr. LEE. Mr. President, on April 11 of this year President Obama nominated Sylvia Burwell to be the new Secretary of the Department of Health and Human Services—HHS—a position that was vacated that same day by former Secretary Kathleen Sebelius.

Article II, Section 3, Clause 2 of the United States Constitution grants the President, as the chief executive, plenary power to nominate members of his cabinet. But that same clause reserves the power of appointment—that is, the power to accept or reject the nominee—exclusively to the Senate.

The Constitution explains this unique division of power as follows: the President “shall nominate, and”—this is important—“by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States.”

Far from a perfunctory practice, the responsibility to review the fitness of presidential nominees is one of the essential mechanisms in our Constitution's system of checks and balances.

And for the Members of this body who took an oath to “support and defend” the Constitution, this is one of the most solemn duties incumbent upon those occupying the office of United States Senator.

I urge my fellow Senators to demand that prior to confirmation Ms. Burwell provide concrete, specific, and forthright answers—in writing—to the questions that have been asked of her by Members of this body.

I refuse to sit idly by and witness the same Washington charade in which stated commitments to transparency are more important than actual demonstrations of candor.

If we do not insist that Ms. Burwell's appointment be contingent upon the transparency of her confirmation process, we will have established a dangerous precedent for the future of this body.

Let's not forget: much of the authority that resides in HHS ultimately derives from the delegation of authority from Congress. And whenever Congress delegates power to the executive branch, we do so based on the premise that we retain the power of oversight.

Therefore, we cannot, in good faith, hand over the reins of one of the most important executive departments at a time when questions remain unanswered and information is still undis-

closed. Doing so would undermine the institutional prerogatives of the Senate.

When we only partially carry out our constitutional duties to check and balance the other branches, we alone are to blame for the continued accumulation of power in the executive, where unelected bureaucrats are not always as wise or as impartial as their proponents claim them to be.

The unprecedented accumulation of power in the executive today is a demonstrable fact. But it remains an open question whether we in Congress care enough to do anything about it.

At this point, there is good reason for pessimism—if the kind of acquiescence demonstrated in this confirmation process is any indication.

But I remain optimistic, because I know that the American people still get it. Outside the beltway, Americans still instinctively understand the universal truth articulated by James Madison, the father of the Constitution, over 200 years ago—that “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

This is precisely the type of accumulated power possessed by executive departments such as HHS.

This power cannot be curtailed or dispersed overnight. But it will continue to expand inexorably toward tyranny unless Members of Congress—exercising our powers as officers of a separate and coequal branch of government—don't push back.

We can begin by subjecting this nomination to the close scrutiny it deserves.

The first thing we must recognize is that this is not the average presidential nomination. We are not talking about the next secretary of the Department of Motor Vehicles. Quite the opposite: Ms. Burwell has been nominated to preside over one of the largest and most important departments in the Federal Government. No matter who the nominee, this is a job that should be filled with caution and circumspection.

By way of illustration, the HHS Secretary oversees an annual operating budget of about \$1 trillion—that is nearly 25 percent of all Federal spending—as well as 11 separate operating divisions, including the very important Centers for Medicare and Medicaid Services—CMS—and the Food and Drug Administration—FDA.

Moreover, the next HHS Secretary is going to assume the helm of an executive leviathan in the midst of implementing the Patient Protection and Affordable Care Act. Obamacare is not only the most complex—and controversial—law in recent memory, but it delegates an unprecedented amount of authority to the HHS Secretary.

Often this delegation comes in the form of sweeping, open-ended grants of

power that give the Secretary discretion to shape and reshape the law. Like an unending series of blank checks to the bureaucracy, Obamacare contains 700 instances of the ultimate *carte blanche*—"The Secretary shall . . ."—to give the Secretary wide latitude to "develop standards," "award grants," "establish committees," "make adjustments," etc.

This kind of massive delegation of authority is justified—especially by those who see it as a convenient way to avoid the difficulties of lawmaking—on the theory that Congress will retain and exercise some degree of oversight.

And it is true that both chambers of Congress have the ability to hold hearings in which we subpoena executive officials to testify and answer questions about laws, rules, and regulations under their jurisdiction. But as we have seen over the past few years with the implementation of Obamacare, this power is significantly impeded if those executive officials refuse to answer our questions.

These facts raise the central question that ought to guide the Senate's consideration of Ms. Burwell's nomination—namely, how will Ms. Burwell exercise the expansive authority delegated to HHS vis-à-vis the powers and responsibilities of Congress?

Much of the job of the next HHS Secretary will be to facilitate Congressional oversight of the Department, especially in its implementation of Obamacare. Therefore, the Senate's decision should be contingent upon Ms. Burwell's record of engaging with Congress.

Sadly, Ms. Burwell's tenure as the Director of the Office of Management and Budget, as well as her performance in the Senate committee confirmation hearings, gives me concern that she will continue in the pattern of obfuscation and evasion established by outgoing Secretary Kathleen Sebelius.

I therefore respectfully submit that we should proceed cautiously in consideration of this nominee. More cautiously, indeed, than we have up to this point.

For over the past 6 weeks, since the President nominated Ms. Burwell, many in this body have neglected our end of the constitutional division of power—preferring to act as if Ms. Burwell's appointment was a fait accompli.

This state of affairs is troubling—and not simply because questions remain unanswered, and information undisclosed, about Obamacare. The problem is more fundamental than any one law.

The Senate's reluctance to protest against the equivocation and distortion seen in this confirmation process undermines the separation of powers and the system of checks and balances upon which our constitutional order depends.

Respecting and upholding these principles of our Constitution is not a matter of adhering to some arcane formality or following some outdated tradition of the 18th century.

At issue here is whether or not this institution still believes in the reason our Constitution divides power in the first place. Do we still believe, as Madison said, that "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it"?

If we do, then we must employ the tools at our disposal to assert our institutional prerogatives. Doing so will demonstrate to the other branches that the power of government is not simply up for grabs.

Here again Madison's insights are instructive: in the famous Federalist 51, he says, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

But if we disagree with Madison about the encroaching nature of power . . . if we are undisturbed by the great accumulation of power in the executive branch, which predates and will outlive Obama's presidency . . . if we prefer to elevate policy preference and party allegiance over love of liberty and the constitutional rights of Congress . . . then we must not be surprised when—not if—our government takes on the character and the spirit of tyranny.

Let me be clear: the kind of tyranny that threatens us is not of the Saddam Hussein or Bashar al-Assad variety. The tyrannies of Saddam's Iraq and, today, Assad's Syria are barbarous, murderous dictatorships that extinguish every semblance of freedom and maintain their power through violence and brutality.

What I am talking about is the kind of soft despotism that arises when power is consolidated under the auspices of a paternal, benevolent government.

At the end of his study of democracy in 19th-century America, Alexis de Tocqueville explained how this kind of tyranny could emerge within a democratic republic such as ours. Standing as a kind of warning for us today, Tocqueville envisioned "an immense and tutelary power" that "extends its arms over society as a whole," covering it "with a network of small, complicated, painstaking, uniform rules through which the most original minds and the most vigorous souls cannot clear a way to surpass the crowd." It does not "break wills," he said, "but it softens them, bends them, and directs them; it rarely forces one to act"—even Tocqueville didn't foresee the individual mandate—"but it constantly opposes itself to one's acting; it does not destroy, it prevents things from being born."

This is certainly a dark image. But we cannot forget that Tocqueville was bullish about America. He believed

that American democracy had the right attributes needed to avoid descending to these depths.

Chief among these attributes were our constitutional structures that divided power and, more importantly, the spiritedness, courage, and love of freedom that animated the American people and transformed the mere "parchment barriers" of the Constitution into true limits on governmental power.

It is precisely this spirit of freedom that the Senate must recover if we are going to fulfill our constitutional obligations in this confirmation process. Once we recognize the need to assert and defend our interests as a separate and coequal branch of the government, we will begin to focus on what is really at stake in our consideration of this nominee.

The main issue here is not Ms. Burwell's character or credentials—both of which are first-rate—but whether or not her appointment will improve or further deteriorate the legislature's oversight over the executive departments to which Congress has delegated vast amounts of authority.

The question is not whether Ms. Burwell deserves to be HHS Secretary, but whether the HHS, under Ms. Burwell's management, will continue in the pattern of obstinate autonomy and limited cooperation established under her predecessor.

If the answer is no, we cannot possibly vote to confirm this nominee.●

IN REMEMBRANCE OF D-DAY

Mr. HELLER. Mr. President, I wish to remember and honor the brave Nevadans and all Americans who risked their lives defending our liberty on the beaches of Normandy, France 70 years ago. The sacrifices our brave soldiers made on this day set America and the world on a path to peace, freedom, and liberty that all Americans enjoy today.

At dawn on June 6, 1944, the Allied powers stormed the beaches of Normandy and started their march across Europe to defeat Hitler. It was one of the most important days in American history and one the biggest tests our Nation has ever faced. What is known as D-day marked the beginning of the demise of one of the worst enemies that the United States has ever had to face. The brave men that stormed Omaha Beach that day sacrificed their lives, their ambitions, and their relationships with loved ones to liberate those who were enslaved by the Nazis. Their courage demonstrated that America would not sit idly by as countries across the Atlantic suffered, reaffirming America's belief that violations of basic human rights will not be tolerated. Their unwavering service is what has made this country so great and a beacon of democracy. These men believed that freedom was worth fighting for and that reflects what is most inspiring about the United States of America.